No. 79-678

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,
Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor, F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE SAN DIEGO URBAN LEAGUE, INC., IN SUPPORT OF APPELLANT

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BRIEF OF AMICUS CURIAE SAN DIEGO URBAN LEAGUE, INC., IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the San Diego Urban League, Inc. (Urban League), respectfully submits this brief amicus curiae in support of appellant San Diego Gas & Electric Co. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Urban League is a nonprofit community service organization serving the County of San Diego. It is affiliated with the national headquarters in New York City and affiliates in cities throughout the nation. As a community service organization, the Urban League uses the tools and methods of social work, economics, law, and other disciplines to secure equal opportunities in all sectors of our society for Black Americans and other minorities.

The comprehensive goal of the Urban League is to eliminate discrimination and segregation in San Diego County, to increase the economic and political empowerment of blacks and other minorities and, in short, to assist minorities to share equally in the responsibilities and rewards of full citizenship. To accomplish this goal, the Urban League intervenes at all points in the social, ecomonic, and judicial structure where the interests of blacks, other minorities, and the poor are at stake.

Of particular concern to the Urban League is the development of housing opportunities for low and moderate income families. With this concern in mind, the San Diego Urban League has endeavored to advance the efforts of various individuals, organizations, and institutions within the City and County of San Diego to:

1. increase the existing housing stock sufficiently to accommodate the rapidly accelerating demand for housing serving all income groups, and

2. accelerate plans and efforts to facilitate industrial and commercial development in order that job opportunities be reasonably equivalent to the demand.

In a more direct fashion, the San Diego Urban League has implemented its commitment to the development of housing opportunities for all income groups by constructing 57 single-family rental homes. A final subdivision map has

been obtained for 33 additional market rate units. Moreover, the Urban League is currently in the process of developing plans for the construction of 200 condominiums. A significant portion of the San Diego Urban League's development activities has been located in minority neighborhoods. This activity is geared toward furthering the Urban League's goal of providing "real" ownership opportunities in the community as opposed to merely "psychological" opportunities. From a pragmatic standpoint, the Urban League realizes that government cannot be the sole provider of needed housing, nor should it be. For this reason, the San Diego Urban League has taken those affirmative steps necessary to the creation of equal housing opportunities.

The opinion of the California Court of Appeal below, *San Diego Gas & Electric Co. v. City of San Diego* (Jurisdictional Statement, Appendix G), rests upon the opinion of the California Supreme Court in *Agins v. City of Tiburon,* 24 Cal. 3d 266 (1979), and holds:

> "A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal. 3d 605, 611)." *San Diego Gas & Electric Co. v. City of San Diego,* Jurisdictional Statement, Appendix G at 4.

In holding that a property owner faced with unconstitutional land use regulation may never seek compensation in inverse condemnation, the California courts have eliminated a remedy essential to guarantee responsible police power regulation and regulation which is free from arbitrary and unconstitutional effects. Moreover, elimination of the remedy eradicates one more tool necessary to the realization of both improved housing conditions and opportunities. The interests thus presented to the Court by this

case transcend those of the utility company, they include the interests of a broad spectrum of our society.

The Urban League is particularly mindful of the fact that unnecessarily restrictive land use regulations operate to limit the housing opportunities of its members. These limitations are a product of both a decline in the actual number of housing units constructed and the unconscionably high prices of the artificially constrained number of units which are made available. The shortages occasioned by such restrictive regulations translate not only into a decline in the quality and quantity of the regional housing stock, but also into a loss of mobility among current and prospective residents. Studies have documented the filtration phenomenon as being a product of new housing construction.[1] Filtration is the process by which new housing opportunities are created by making available those units which have been vacated by new home purchasers.[2]

As representatives of those who would be among the primary beneficiaries of this filtration process, the Urban League is vitally interested in its proper functioning and therefore seeks to ensure that construction occurs at a level sufficient to permit the continuing functioning of the process.

Additionally, basic economic principles affect the delivery of housing. Access to housing is more readily available and more easily achieved where market disequilibrium is minimized. Overly restrictive land use regulations operate to disturb this necessary equilibrium by creating

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[1]Lansing, Clifton, and Morgan, "New Homes and Poor People, A Study of Chains of Moves," Institute for Social Research, University of Michigan (1969).

[2]*See* Housing Urban America (Pynoos, Schafer and Harftman eds. 1973) at 204-05, and Lansing, Clifton, and Morgan, *supra* note 1.

more risks attendant to entry into the housing market. The investment risk is clear—the costs of uncertainty, of delay, and of the potential for ultimately being unable to make any reasonable economic use of one's property. Amicus believes that the decision appealed from herein will create further market disequilibrium, deter the production of housing, and deny access to housing to greater segments of the population.

It is the Urban League's position that community interests are best served by making adequate provision for the housing needs of all income groups. Amicus curiae strongly believes that the effect of the decision rendered by the Court of Appeal in the instant case will be contrary to these interests.

The Urban League views property rights as basic civil rights. It believes that only through the provision of a full range of effective remedies can property rights be protected and the negative impacts of arbitrary and discriminatory land use regulation be avoided. The Urban League is not opposed to responsible land use planning; it recognizes that planning can be used to further a variety of legitimate goals. This recognition, however, does not diminish the fact that land use regulatory policies have also been used for illegitimate purposes, including the exclusion of minorities and individuals of disadvantaged economic status. The Urban League suggests that it is only through the provision of both the money damages remedy and the invalidation remedy that its goal of eliminating discriminatory land use policies and facilitating upward mobility for its members can be realized. In order to fully represent the views of its members, it addresses the issues raised herein from both the perspective of property owners who are faced with regulatory excesses and persons in search of affordable housing who would be the beneficiaries of responsible land use regulation.

SUMMARY OF ARGUMENT

1. The *San Diego Gas & Electric Co.* decision, in reliance upon *Agins v. City of Tiburon, supra,* limits the remedies available to a property owner subjected to unconstitutional regulation. The limitations result in invalidation being the sole remedy available. Amicus takes the position that a full range of remedies is essential to the preservation of basic constitutional rights and protection from arbitrary, discriminatory, and exclusionary land use policies. The judicially prescribed remedy fails to provide a full measure of relief to the property owner injured by unconstitutional regulation in that it operates to perpetuate the injury. Similarly, the invalidation remedy fails to protect the individual confronted with exclusionary land use practices in that it fails to operate as an effective deterrent to discriminatory action. In both cases, by limiting the remedies available, the injured parties are left with a nonremedy. The Urban League believes that it is only through the provision of a full range of remedies that adequate relief can be afforded.

Amicus further argues that restriction of judicial remedies operates to the detriment of the housing consumer. The effect of absolving communities from the consequences of their decision making is to encourage arbitrary and exclusionary land use practices and to add to the risk incident to housing production. The result is not only that less housing will be produced at increased cost, but also that entry into the housing market will be an experience reserved for the exclusive few.

2. The *San Diego Gas & Electric Co.* decision poses a serious threat to the integrity of the individual right of property. It is the position of amicus that the burden of promoting the public good should not be borne, even if only for an interim period (*i.e.*, the period when the offending regulation is effective), by a single landowner.

To impose such burden would defeat the distributional policy of the Just Compensation Clause. The Fifth Amendment guarantee that private property shall not be taken for a public use without first paying just compensation is grounded in the belief that government should not be allowed to force some people to bear the costs of achieving some public good which should be borne by the public as a whole. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). As this Court stated in *United States v. Fuller*, 409 U.S. 488, 490 (1973), "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness [citations omitted], as it does from technical concepts of property law." To require the individual landowner to bear the burdens associated with promoting public goals such as open space preservation or preservation of scenic vistas along the California coast would violate the principles of fairness upon which the Just Compensation Clause is based.[3]

Amicus does not herein argue the question of what degree of regulation effects an unconstitutional taking. The concern is with preservation of a property right once infringement of the right has been determined in court. An effective means for the protection of property rights must be available. The right of property must be guarded as is every other right within the penumbra afforded constitutional protection. *See Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Moreover, the Court in *Owen v. City of Independence, Missouri*, 48 U.S.L.W. 4389, 4397-99 (1980), has enumerated several

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[3]*See* Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553 (1972); Baumgardner, "Takings Under the Police Power —The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances," 30 Sw. L. J. 723 (1976).

important public policy reasons supporting the availability of the damages remedy to correct violations of basic civil rights. Inasmuch as a person's right to property is recognized as a basic civil right, the public policy reasons announced by the Court in *Owen* regarding the need for the damages remedy are applicable here. The remedy of invalidation is not sufficient by itself to safeguard the constitutional guarantees contained in the Fifth Amendment and to effectuate the distributional policy of the Just Compensation Clause. Elimination of the damages remedy strikes at the very heart of the institution of private property.

3. The policy concerns which provided the basis for the California Supreme Court's elimination of the inverse condemnation remedy in *Agins* assume that there is a higher importance in achieving varying public goals than in maintaining the integrity of basic constitutional guarantees. The perceived threat of fiscal harm to municipalities and the chilling impact on the land use planning process cannot justify the evisceration of constitutional rights. This Court repudiated the chilling impact argument in *Owen* in the Civil Rights Act context. Amicus urges the Court similarly to repudiate the argument in the context of Fifth Amendment violations.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 26, 1979, is unreported. A copy of the opinion is attached as Appendix G to the Jurisdictional Statement.

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case as it appears in the brief for appellant.

ARGUMENT

I

THERE IS A PROFOUND NEED FOR A WIDE RANGE OF EFFECTIVE REMEDIES TO SAFEGUARD THE INTERESTS OF THE PROPERTY OWNER AND THE HOUSING CONSUMER

A. Effective Remedies Are Needed to Prevent Exclusionary Land Use Practices

Perhaps the darkest side of land use regulation and the exercise of the police power is the use of such regulatory powers by municipalities to exclude certain socio-economic segments of society. It is all too apparent that environmental regulations, such as open space ordinances, may be motivated not so much by a concern for the physical environment, as a concern for preserving and maintaining the exclusivity of the community. Recent studies have demonstrated that local governing bodies have used restrictive development standards to serve purely local interests. The National Commission on Urban Problems noted in *Building the American City* (1968), that:

> "Most communities want all cream and no skim milk. They want the best, not only in physical structures and facilities, but also in the *economic* levels of people who will become their future citizens . . . . Each community engages in one-upmanship; attempting to outdo its neighboring communities." *Id.* at 19 (emphasis added).

The proliferation of this attitude is described in the Rockefeller Brothers Task Force study, *The Use of Land: A Citizens Policy Guide to Urban Growth* (1973). The report states:

> "In the midst of a mobile and expanding population, local governments represent the people already there. Prospective residents, who may be destined to double or treble the population of the community, do not live within local boundaries and therefore do not vote. The

local government thus speaks for the people who got there first.

> "Many of these first arrivals have recognized for years that additional development has little to offer them. *Some suburbs have engaged in a curious intermunicipal competition in which development (particularly low- or moderate-income housing) has been perceived as the common enemy, threatening to overrun the weak or inattentive locality. Municipal efforts to combat the threat have resembled nothing so much as competitive dikebuilding by neighboring landowners, each hoping that his higher dikes will keep the floodwaters off his own land and drive them onto his neighbors' instead.*" *Id.* at 225-26 (emphasis added).

Perhaps this parochial attitude is the reason why in recent years the courts have been faced with an increasing number of exclusionary zoning cases and have been forced to grapple with ordinances which limit development and effectively exclude people from suburban communities. *See Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (1970) (two to three acre minimum lot size); *Appeal of Girsh*, 263 A.2d 395 (1970) (prohibition of apartment buildings); *National Land & Investment v. Kohn*, 215 A.2d 597 (1965) (four acre minimum lot size); Rose, *After Mount Laurel: The New Suburban Zoning* (1977).

Restrictions on the supply of land have such an integral relationship to the cost of housing that it does not require a particularly adroit municipality to structure a land use regulation which subtly excludes any designated segment of society.

Invalidation of such selfish and shortsighted municipal regulation is an available remedy to attempt the correction of exclusionary municipal practices. This remedy by itself, however, is not wholly adequate to solve the problem.

It is the position of amicus that a full panoply of effective remedies, including the damages remedy, must be available to insure meaningful relief, to serve as a deterrent to municipal circumvention of constitutional rights in the enactment of land use regulations, and to create conditions in which housing for poor, moderate, and middle income people will be produced. The Supreme Court of New Jersey in *Southern Burlington County NAACP*, 336 A.2d at 734, described the situation aptly:

> "Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the *opportunity* through appropriate land use regulations . . . ." (Emphasis added.)

Conditions favorable to the provision of housing for all economic segments of society have been advancing slowly in this country. This Court first invalidated a zoning ordinance specifically prohibiting occupation by "persons of color" in *Buchanan v. Warley*, 245 U.S. 60 (1917). While in *Buchanan* the Court focused on the rights of the property owner, this Court subsequently has focused on the civil rights of the excluded minorities and has utilized the Equal Protection Clause of the Fourteenth Amendment to outlaw state and local measures effectuating racial discrimination. *See, e.g., Reitman v. Mulkey*, 387 U.S. 369 (1967); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The Federal Circuit Courts have also been active in invalidating zoning legislation motivated by a desire to promote racial segregation. *See, e.g., Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Kennedy Park Homes Association, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 91 S. Ct. 1256 (1971).[4]

[4]*See* Babcock, Richard F. *Exclusionary Zoning* (Praeger, 1973) at 33-34. Babcock details decisions which have voided legislation designed to further racial segregation.

It is the goal of amicus to ensure that housing opportunities are provided through the adoption of responsible and appropriate land use regulation. A wide range of citizen remedies are necessary to ensure that such opportunities are provided. Progress has been made in alleviating outright discrimination. To eliminate the damages remedy for unconstitutional violations of personal property rights portends regression and jeopardization of that progress which has been made in ensuring responsible and accountable land use regulation. If allowed to stand, the California court's decision would be an impediment to continued progress.

B. Invalidation By Itself Is Wholly Inadequate to Protect Personal Interests in Property

The invalidation remedy must be viewed from two perspectives: first, the landowner, and second, the housing consumer. Amicus strongly urges that there is no real relief provided to the landowner by the invalidation remedy afforded by the California courts. Moreover, it is not particularly effective, by itself, as a deterrent to the circumvention of constitutional rights. It is illusory at best and, in practice, actually perpetuates the injury imposed by the invalidated ordinance.

1. Invalidation Returns the Problem to the Entity Which Caused It In the First Place

It is fair to presume that the public objective which has been thwarted by invalidation of the ordinance enacted for its achievement remains. Thus, it is likely that a public agency will pursue the objective through enactment of still another ordinance. The landowner who has won "relief" from the first ordinance will be burdened anew, albeit to a greater or lesser extent.

Similarly, although the public interest group representing the poor and minorities may manage to set aside exclusionary land use regulations, it is then faced with the fact that traditionally the role of the court has been essentially negative in character. The court may invalidate the offending regulation, but it has not granted definitive relief and prescribed the affirmative measures necessary to create housing opportunities. *See, e.g., Southern Burlington County NAACP*, 336 A.2d at 734.

While a few courts have been willing to sit as super planning agencies or zoning boards of appeals, most courts have been reluctant to perform such roles. Invalidation thus forces the housing litigant from courtroom to planning board to courtroom and back again. This process, more commonly known as the "zoning-amendment shuffle," may cause such utter frustration that, in the end, not a single affordable housing unit is built. *See* Mytelka, Arnold K., "Judicial Remedies" in *After Mount Laurel: The New Suburban Zoning*, at 150, 152 (Center for Urban Policy Research, 1977).[5]

The invalidation remedy thus can have devastating practical effects both on the property owner and those in search of affordable housing. While attempted resolution of the controversy continues indefinitely, the landowner is deprived of the fruitful use of his property, and housing consumers are denied meaningful opportunities to obtain affordable housing. In the absence of active judicial inter-

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[5]In this regard it should be noted that while the court may enjoin enforcement of the unconstitutional ordinance, the municipality may retaliate and enact a moratorium, pending reconsideration of the challenged ordinance. *See, e.g.*, Cal. Government Code § 65858 which permits enactment of a moratorium for up to two years in contemplation of amendments to zoning ordinances or general plans. This renders the invalidation remedy all the more ineffectual against arbitrary and capricious action.

vention in the zoning-land use planning and regulation process, invalidation is frequently a Pyrrhic victory devoid of meaningful relief for both the landowner and the housing consumer.

2. Invalidation Does Not Achieve the Cost Distribution Objective of the Just Compensation Clause

The cost distribution objective of the Just Compensation Clause has long been upheld by this Court. *Armstrong v. United States*, 364 U.S. at 49.

In the aftermath of litigation resulting in invalidation, and during that period when the municipality seeks a legitimate means to achieve the objectives embodied in the challenged ordinance, the impacted landowner is shouldering a burden which should be borne by the community as a whole. The burden is evidenced by the wrongful denial of the private use of his land in order to further some public purpose. This is sacrificing the individual to the community. Even at the moment the court concludes that the landowner is paying more than his fair share, and for that reason invalidates the ordinance, the inequity continues. Thus, invalidation does not provide the protection which is the basis for the just compensation guarantee. There is a total failure to distribute the loss.

This is to be contrasted with the remedy of inverse condemnation. Under that remedy, the burden of providing a public benefit or preserving a public resource would not be borne exclusively by the individual property owner. The cost of providing such benefits would be distributed equitably among the ultimate beneficiaries of the regulation, the entire community.

C. Restriction of Judicial Remedies In the Land Use Context Will Detrimentally Affect the Nation's Housing Consumers

The elimination of the inverse condemnation remedy allows cities and towns to exclude housing through zoning ordinances without any significant fear of adverse financial consequences. It enhances the ability of municipalities to obstruct the migration of racial minorities and low income families from the central cities to suburban areas, to impede the acquisition of decent housing, and to restrict the opportunity for an improved quality of life. The restriction of remedies must therefore be characterized as contrary to the public interest.

The importance of home ownership to most Americans cannot be understated. Traditionally, owning a home is a goal which has been actively pursued not only because it is considered the preferred mode of housing, but also because it is viewed as symbolic of having realized the much sought after American way of life.[6] Over the years, this goal has not waned. Increasingly, however, the upwardly spiraling cost of home ownership has dampened or dashed the housing aspirations of large segments of the population.

Recent statistics indicate that in 1976 the median price of housing in the State of California was $47,160.[7] Currently, the figure stands at $98,994.[8] This represents an increase in excess of 100% in the last four years. In contrast, the median household income in 1976 was $14,000[9]

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[6]Frieden, Bernard J., "The Environmental Protection Hustle, The Massachusetts Institute of Technology" (1979) at 1.

[7]California Association of Realtors, "California Real Estate Trends Newsletter," Vol 1, No. 5 (July 10, 1980).

[8]California Association of Realtors, *supra* note 7.

[9]Department of Housing and Community Development, "California Statewide Housing Plan, 1977" at C-48.

and presently is $18,400,[10] a 31% percent increase for approximately the same time period. The foregoing figures clearly reveal that income has not kept pace with the cost of housing. Furthermore, the increases in the median cost of housing, in large part, have eliminated the supply of low cost housing. The net effect is that home ownership is eluding a greater number of Americans on a daily basis.

While several factors have contributed to the escalating cost of housing in the 1970's, government regulations and particularly those relating to growth restrictions and the preservation of open space, have combined to limit and delay new housing starts, to raise its cost, and to restrict the availability of low and moderate income housing.[11] Numerous studies have documented the inflationary impact of housing regulation.[12] They point out that government policy and regulation have been significant factors responsible for the creation of a housing scarcity. This scarcity has forced prices to escalate, and results in a pronounced reduction in the number of people who can buy new homes.[13] What formerly was a goal that most could achieve,

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[10]Department of Housing and Community Development, "California Statewide Housing Plan 1979 Update" 78 (December, 1979).

[11]Frieden, *supra* note 6 at 10.

[12]*See, e.g.*, Schwartz, Hansen, Green, Moss and Belzer, *The Effect of Growth Management on New Housing Prices: Petaluma, California* (hereinafter Petaluma Report), Institute of Government Affairs, Institute of Ecology, and UCD Kellogg Program, University of California, Davis (1979); Urban Land Institute and Gruen, Gruen & Associates, *Effects of Regulation on Housing Costs: Two Case Studies,* Washington, D.C., Urban Land Institute (1977); and Seidel, Government Regulations and Housing Costs, Rutgers University Center for Urban Policy Research (1977).

[13]The Petaluma Report concludes that single family houses built in Petaluma after growth management were fewer in number, larger, and more expensive (in constant dollars) than those built before growth management. Petaluma Report, *supra* note 12 at 59. The Urban Land Institute and Gruen, Gruen & Associates' study

is now one that is reserved for the exclusive few. The escalating cost of housing has had an even more egregious impact on blacks and other minorities. While such groups were previously excluded from the housing market by blatantly discriminatory legislation, minorities now find themselves confronted with a more subtle, but equally effective, vehicle for exclusion—land use regulatory policies. The *San Diego Gas & Electric Co.* decision will only exacerbate the problem by immunizing governmental officials from liability for their actions.

Perhaps the most far reaching consequence of overly restrictive land use regulation is elimination of the social and economic mobility which may be attained through home ownership. Restrictive land use policies which frustrate the ability of the construction industry to meet housing demand will be responsible for a continuing deterioration of housing conditions. New construction helps those most in need of improved housing conditions and makes possible upward mobility by way of housing filtration. The importance of the filtration process, which results from the construction of new housing, has been demonstrated by a study conducted by the Survey and Research Center at the University of Michigan.[14] The study reveals that the construction of one new unit makes possible a succession of three and one-half moves to different and potentially improved housing accommodations. Thus, the construction of new housing units benefits a greater number of people indirectly than it does directly. Additionally, the study indicates that those most likely to be the indirect recipients of the benefits inhering in the filtration process are those in

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points out that "stringent development constraints have resulted in heavy competition for scarce housing and price increases of 25-100 percent per year." Urban Land Institute, *supra* note 12 at 1.

[14]Lansing, Clifton, and Morgan, supra note 1.

the low and moderate income categories. The housing opportunities for those income groups will be further reduced if the filtration process is inhibited by restrictive regulations on the construction of new housing.

The *San Diego Gas & Electric Co.* decision further frustrates the interests of those in search of affordable housing by increasing the risks associated with the production of housing. The result is inflated housing prices. Where the provision of housing becomes a high risk undertaking, due to the probability, for example, of delay, lengthy litigation to overturn invalid regulations or arbitrary and capricious governmental action, that risk factor is ultimately passed on to the consumer. Economist Paul Samuelson expresses the point as follows:

> "If people generally act like risk averters . . . they will prefer smaller steady incomes to erratic incomes even when those average out to a higher figure. Therefore, economic activities that involve much uncertainty and risk . . . will be forced by comparative entry and exit of risk takers to pay, over the long run, a positive profit premium to compensate for aversion to risk. The yield on capital invested in such industries will involve, in addition to pure interest corresponding to safe investments, an extra element corresponding to positive profit."[15]

The added risk factor can have another effect, equally detrimental to the housing consumer. In the face of a multi-level review procedure, the chances of obtaining project approval are as slim as the risks associated therewith are great. Few are therefore in a position to take such risk. The rewards, however, for those who survive the reviews are many. For the survivors, a virtual monopoly on new housing starts is guaranteed and the homes which result

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[15]Samuelson, *Economics: An Introductory Analysis* 604 (6th ed. 1964).

can be marketed at prices dictated by the monopoly holder. Regulation is thus eliminating competition in the homebuilding industry. Frieden describes the problem as such:

> "Formerly, developers had to compete against each other for the consumer's dollar and competition kept prices down. Now developers compete against each other for building permits. But once a developer has his permit in a place where local housing demand is strong, there is so little competition in the marketplace that he can earn enough profit to make the risk worth taking."[16]

In either scenario, it is the housing consumer that is injured by the added risk factor insofar as it discourages entry into the housing market, reduces housing competition, and results in less housing at higher prices. The *San Diego Gas & Electric Co.* decision, by creating uncertainty and exacerbating market disequilibrium, adds significantly to a critical housing problem. The problem is evidenced by the impassioned cry for rent control ordinances, condominium conversion ordinances, and similar regulations.

Exclusionary land use policies have proliferated under the guise of environmental regulation. Typically, land use regulations have been promulgated in response to the articulately phrased arguments of growth opponents that homebuilding results in adverse environmental impacts. However, homebuilding does not have to conflict with basic conservation goals. The real motivation of growth opponents is often found in the desire to maintain the status quo and the exclusivity of the community. Just as this Court has forbidden exclusion clearly based on race or national origin,[17] so should this Court disallow and deter

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[16]Frieden, *supra* note 6 at 150.

[17]*See, e.g., Buchanan v. Warley,* 245 U.S. 60 (1917); *Hunter v. Erickson,* 393 U.S. 385 (1969); *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Shelly v. Kraemer,* 334 U.S. 1 (1947); *Oyama v. California,* 332 U.S. 633 (1948).

exclusion which is solely motivated by a municipal desire to further purely parochial aims to the detriment of the economically disadvantaged. A wide range of remedies is necessary to ensure municipal responsibility as well as accountability.

II

THE FEDERAL CONSTITUTION THROUGH THE JUST COMPENSATION CLAUSE GUARANTEES THE AVAILABILITY OF THE MONEY DAMAGES REMEDY TO PROTECT PERSONAL RIGHTS IN PROPERTY

A. Protection of Personal Rights In Property Against Government Intrusion Is a Fundamental Precept of the Federal Constitution

For nearly two centuries, American political scientists and legal scholars have pointed to protection of personal rights in property as the fundamental motivation for adoption of the Federal Constitution.[18] In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth century jurists broadly construed the Contract Clause, United States Constitution, Article I, Section 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas*, 123 U.S. 623 (1887). This Court has unambiguously indicated that the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation op-

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[18]*See*, Sugan, Bernard, *Economic Liberties and the Constitution* (University of Chicago Press 1980) Chapters 2-4. A copy of the manuscript has been lodged with the Court.

erates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As stated by Justice Holmes:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

Despite the safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property. Through a multitude of regulatory programs, personal rights in property have been compromised and sometimes totally disregarded.

Without question, personal rights in property are held subject to society's right to be assured of public health, safety, and welfare. With the growth of cities and concomitant increase in urban density, public versus private conflicts were inevitable. The notion of which subjects are appropriate for regulation has necessarily expanded. As this Court stated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), "In a changing world, it is impossible that it should be otherwise."

Although an individual's freedom to use, enjoy, and derive profit from property has been severely diminished, the person whose property interests have been subject to regulation which goes "too far" has not been without an effective remedy. In the land use regulatory context, the remedy of money damages is required by the Fifth Amendment. By this constitutional provision, the landowner is guaranteed just compensation when his property is taken.

Without question land use regulations can effect a "taking." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In the event that it does, logical application of the constitutional guarantee

requires either that the "taking" be eliminated or that just compensation be provided. Invalidation of an offending regulation neither removes the "taking" (*see* Argument I(B)(2), *supra*), nor provides compensation. The inverse condemnation remedy on the other hand provides the required just compensation. Therefore, unless an offending regulation can be challenged by inverse condemnation, a person has no means of enforcing his constitutionally guaranteed rights. Without the remedy, the Just Compensation Clause would be meaningless in the land use regulatory context. This compels the conclusion that the availability of inverse condemnation to challenge a land use regulation is affirmatively required by the clause. *See Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978); *Kaiser Aetna v. United States,* 48 U.S.L.W. 4045 (1979); *Gordon v. City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal. 1974); *Richmond Elks Hall Association v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1330-32 (9th Cir. 1977); *Arastra v. City of Palo Alto,* 401 F. Supp. 962 (N.D. Cal. 1975); *decision vacated by stipulation of parties,* 417 F.Supp. 1125 (1976).

B. The Policy Reasons for Holding Municipalities Liable for Damages Pursuant to 42 U.S.C. § 1983 Announced By This Court In Owen v. City of Independence, Missouri, Supra, Are Equally Applicable to Violations of Personal Property Rights Guaranteed By the Fifth and Fourteenth Amendments

In *Lynch v. Household Finance Corp.* 405 U.S. at 542, 552, this Court rejected any distinction between personal liberties and property rights and made it clear that the rights protected by the Fourteenth Amendment are in fact "basic civil rights." The Court quoted from *Shelley v. Kraemer,* 334 U.S. 1, 10 (1948), as follows:

> " 'It cannot be doubted that among the civil rights intended to be protected from discriminatory state action

> by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.'" *Lynch*, 405 U.S. at 544.

This Court pointed out further in *Lynch* that

> "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch*, 405 U.S. at 552.

In *Owen v. City of Independence, Missouri, supra,* this Court held, interpreting 42 U.S.C. § 1983 and its forerunner, the Civil Rights Act of 1871, that a municipality has no immunity from liability under Section 1983 for its constitutional violations and that it may not assert the good faith of its officers as a defense to such liability. The Court set forth several public policy reasons why the money damages remedy should be available against municipalities and why it should reject arguments in support of a qualified municipal immunity. Since the source of civil rights guarantees is the Fourteenth Amendment, the policy reasons supporting the unqualified extension of the damages remedy under the Civil Rights Act apply equally to violations of the Fourteenth Amendment.

In *Owen* the Court identified the following public policy concerns:

> "A damages remedy against the offending party is a vital component of any scheme for vindicating

> cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrong-doer is the institution that has been established to protect the very rights it has transgressed. . . . Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. [Footnote omitted.]" *Owen*, 48 U.S.L.W. at 4397.

The Court also stated:

> "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. [Footnote omitted.] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of *unintentional* infringements on constitutional rights. [Footnote omitted]" *Owen*, 48 U.S.L.W. at 4397 (emphasis added).

Rights in property should enjoy no less protection under the Federal Constitution than any other civil right. Equality in the enjoyment of property rights is to be furthered not only by the Civil Rights Act, but by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 10. The preceding public policy considerations which provide the basis for extending monetary liability to municipalities for civil rights violations under Section 1983, apply equally to property rights violations under the Fifth and Fourteenth Amendments. There is no compelling reason to immunize municipalities or municipal officials in either situation. In both situations constitutional guarantees need to be protected and vindicated. There is an identity of interest in preventing further injurious conduct and a need to minimize the likelihood of unintentional infringements of constitutionally guaranteed civil rights.

The same considerations of fairness related to the distribution of loss occasioned by unconstitutional action as discussed in *Owen* are applicable in the context of Fifth and Fourteenth Amendment violations. In *Owen*, this Court considered decisions conferring qualified immunity on various government officials and determined that public policy reasons for conferring immunity are not applicable where the liability of the municipal entity is at issue. The Court stated:

> "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby.
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> . . . .
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> ". . . [E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Owen*, 48 U.S.L.W. at 4398.

Just as Section 1983 of the Civil Rights Act is intended to properly allocate the costs associated with constitutional violations amongst the victim, the municipal entity and the public as represented by the municipal entity (*Owen*, 48 U.S.L.W. at 4399), so too is the Just Compensation Clause of the Fifth Amendment intended to

> "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In the same vein, this Court has previously announced that

> "[t]he Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie within the path

of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

The distributional policy found by the Court to exist in Section 1983, and to be furthered by its decision in *Owen, supra*, is basic to the Just Compensation Clause. The same *means* identified by the Court in *Owen* to realize the policy embodied in Section 1983 are required to fully achieve the distributional policy of the Just Compensation Clause and the protections afforded by the Fourteenth Amendment.

III

THE "CHILLING EFFECT" RATIONALE ASSERTED AGAINST AVAILABILITY OF THE MONEY DAMAGES REMEDY CAN NEVER JUSTIFY CIRCUMVENTION OF FEDERALLY GUARANTEED RIGHTS

The California Supreme Court in *Agins v. City of Tiburon*, upon which the decision appealed from herein relies, set forth several policy reasons for elimination of the damages remedy in the regulatory context. It indicated that in reaching its decision it was persuaded by "the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy." *Agins*, 24 Cal. 3d at 276-77. This Court is urged to closely scrutinize the "chilling impact" rationale. Amicus submits that this rationale is not compelling when viewed in the light of the constitutional rights to be protected.

The California Supreme Court's opinion in *Agins* reflects an overriding concern for the impact on the public fisc and an insensitivity to the impact on the property owner of the court's preferred remedy, invalidation. This attitude underscores an improper approach to adjudication involving the just compensation guarantee. This Court has indicated that the economic impact of regulation on the

claimant is of "particular significance" in resolving controversies arising under the Just Compensation Clause. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. The California Supreme Court in *Agins* ignored this significant factor.

Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner. The costs of education, welfare, health services, transportation, and other services heavily burden local governments. Provision of open space and allocation of land use in general should not be treated differently. "Interfering with the individual rights of a few property owners will not solve the financial crises of our state and local governments."[19]

This Court considered the chilling impact argument in the context of damage awards for civil rights violations in *Owen v. City of Independence, Missouri, supra.* The majority rejected the chilling impact argument and stated:

> "First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. [Citation omitted.] More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at

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[19]Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law 25, 44 (1973).

> some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator put it, 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions.'" *Owen*, 48 U.S.L.W. at 4398 (emphasis in original).

Amicus urges this Court to view the chilling impact arguments set forth in the California Supreme Court's opinion in *Agins* in the light of its pronouncements in *Owen*.

CONCLUSION

The *San Diego Gas & Electric Co.* decision has placed in jeopardy the fundamental constitutional right of property. This is a right of individual liberty. *Lynch*, 405 U.S. at 552. The availability of a remedy in inverse condemnation to challenge regulatory action is essential to the protection of that right and, further, is essential to protection from governmental abuse and discrimination. If allowed to stand, the decision will dilute the positive achievements which have been made in guaranteeing personal liberties, insuring socio-economic advancement, and creating opportunities for improved housing conditions. The interests which have been advanced as providing the basis for immunizing communities from financial liability cannot warrant abrogation of these fundamental rights and interests.

For the foregoing reasons amicus curiae Urban League respectfully urges that the *San Diego Gas & Electric Co.* decision be reversed.

Respectfully submitted,

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